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No. 05-848

In the

# Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
*Petitioners,*

v.

DUKE ENERGY CORP., ET AL.,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF FOR THE PETITIONERS

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The petition demonstrated that the Fourth Circuit violated Section 307(b) by invalidating national CAA regulations that the D.C. Circuit, exercising its "exclusive" review authority under the Act, upheld. See *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (*New York I*). As we also showed (Pet. 12, 22, 25-26), the court's holding conflicts directly with *New York* on a critical issue by construing the CAA unambiguously to *forbid* EPA from using an actual, annual emissions test for PSD emissions increases – the test *New York* construed the Act unambiguously to *require* for PSD.

Neither brief in opposition seriously engages these points, let alone rebuts them. Duke takes the Court on a meandering tour of what it claims to be the regulatory history, the apparent purpose of which is to make the basic issues of statutory construction actually presented seem hopelessly complex, and it tries to redraft a Fourth Circuit ruling that declared the "wording" of the EPA's NSR regulations "largely irrelevant" in the face of an "effectively irrebuttable" rule of statutory construction. See Pet. App. 11a n.3, 18a. Duke nowhere explains why it did not properly raise a challenge based on *Rowan Cos., Inc. v. United States*, 452 U.S. 257 (1981), in the D.C. Circuit, the court with exclusive authority to declare the regulations' validity or invalidity under the Act – nor why its failure to do so should expand the authority of another court.

The United States' brief is remarkable for its studied failure *even to address* what its petition for rehearing en banc acknowledged to be a direct conflict between *New York I* and the Fourth Circuit's decision: the former construes the Act's unambiguous text to command that PSD emissions "increases" be measured by actual (as opposed to potential) emissions, while the latter construes the statute to forbid it. And despite having admitted that the Fourth Circuit's decision poses "serious consequences for EPA's ability to maintain a consistent and fair regulatory scheme," and "undermines critical aspects of the PSD rules," U.S. En Banc Pet., No. 04-1763 at 14, *and* having unsuccessfully sought

rehearing en banc review of *New York I*'s ruling that the Act's plain text requires an actual emissions test for PSD, the government now asserts that the decision below, however wrong, is unworthy of review – because "the agency believes it can address any difficulties caused by the court of appeals' decision through rulemaking." Opp. 9. But EPA's bare proposal to promulgate regulations "to establish a test consistent with" a ruling it regards as a misconstruction of the Act, see 70 Fed. Reg. 61081, 61083 & n.3 (Oct. 20, 2005), only underlines the need for this Court's review. The D.C. Circuit's *New York I* decision and the decision below bind EPA to conflicting mandates on the "actual" versus "potential" measures of emissions, each based on respective courts' readings of the Act's unambiguous terms. EPA cannot satisfy both as a matter of logic, and review by this Court offers the only opportunity to remedy the systematic disarray that the ruling below has caused and, unreviewed, will continue to cause.

1. Although Duke insists that the court of appeals was merely engaged in interpretation of the PSD regulations, the court itself considered "the wording and various interpretations of the PSD regulations" as "largely irrelevant to the proper analysis of this case," Pet. App. 11a n.3, because the Act's "plain language" required that the components of the Act's definition of modification must "be interpreted identically" in EPA's regulations implementing the two programs. Pet. App. 14a, 17a. See Pet. 8, 18-19; U.S. Opp. at 3 & n.1 (acknowledging that the NSPS regulations measure emissions increases by reference to "maximum hourly emissions rates" and the 1980 and 2002 PSD regulations turn on "total annual emissions (tons per year)"). As the United States correctly explained below, "requiring EPA to interpret the PSD regulations to adopt the NSPS test for measuring emissions increases is inconsistent with the plain language of the regulations and thus is not 'interpretation' at all, but rather invalidation." U.S. En Banc Pet., No. 04-1763 at 12. See

also NPCA Amicus Br. 4-11.[1] The PSD regulations, which nowhere mention maximum hourly rates, cannot be "interpreted" to provide for the NSPS-style potential emissions test; and even if their plain language did not rule it out, such a move would directly contravene the D.C. Circuit's insistence that the Act precludes a test based on potential emissions. *New York*, 413 F.3d at 38-40; *Alabama Power v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979). See also *New York v. EPA*, 2006 WL 662746, *6 (D.C. Cir. March 17, 2006) ("*New York II*") (in striking down EPA's 2003 Equipment Replacement Rule, observing that "[t]o the extent industry intervenors [including Duke, and represented by Duke's counsel here] rely on the NSPS regime to reargue their position that 'modifications' require an increase in maximum emissions rates, that issue was resolved in *New York I*, 413 F.3d at 19-20, 40; see also *New York v. EPA*, 431 F.3d 801, 802-803 (D.C. Cir. 2005) (Williams, J., concurring in denial of rehearing)").

Having called the Fourth Circuit's action what it plainly was – "invalidation" of national CAA regulations in an enforcement action – and having foreseen "disarray" as a result, U.S. En Banc Pet., No. 04-1763 at 15, the United

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[1] Straining to resist Duke's diversionary exercise in serial bamboozlement, we pause to note that its account of the 1980 regulations (Opp. 7-8) willfully conflates the separate "emissions increase" and "physical change" prongs of the modification test. See 40 C.F.R. 51.166(b)(2) (1987); see also *New York II*, 2006 WL 662746, *6. The "increased hours of operation" exemption provides that increased hours alone do not constitute a physical change – not that where there *has* been a physical change, increases in actual emissions resulting from more hours of operation can be ignored, in violation of the D.C. Circuit's repeated holdings that increased actual emissions *cannot* be ignored by PSD, see *New York I*, 413 F.3d at 38-40; see also *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 916 n.11 (7th Cir. 1990); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 913-16 (1st Cir. 1990). As Duke concedes (Opp. 4), an hourly rate test "automatically" ignores emissions from increased hours. The hourly rate test imposed by the Fourth Circuit would deprive the exemption of any meaning

States now says review is not warranted because of the figleaf-shaped footnote, App. 15a n.7, in which the court *claimed* to respect the limit on its jurisdiction. (The United States ignores the court's other, figleaf-removing footnote, App. 11a n.3.) But as this Court recognized in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978), Section 307(b)'s strictures are not limited to acknowledged usurpations, and a footnoted ipse dixit does not alter the "disarray" that necessarily attends invalidation-in-deed of national CAA rules upheld by the D.C. Circuit. States that must administer complex pollution control programs in conformity EPA's regulations depend on the rules' stability and predictability. See States' Amicus Br. at 12-15.[2]

2. In *New York I*, the court rejected the argument that EPA's 1980 and 2002 PSD/NNSR regulations violated the Act by diverging from pre-1977 NSPS regulations that allegedly used a "maximum hourly emissions" test. 413 F.3d at 19-20. Thus, in a Section 307(b) "exclusive" review proceeding, the D.C. Circuit upheld the same regulations the court below struck down as contrary to the CAA.[3]

Respondents are left to point out that the D.C. Circuit did

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[2] The conflict between the Fourth Circuit and the D.C. Circuit's rulings is already causing enormous confusion among regulators and regulated alike. This confusion extends to the 2002 PSD regulations governing current operations and planning, as well as the 1980 and 1992 regulations applicable to the class of massive enforcement cases like this one, because all use an actual, annual test, rather than the potential, hourly emissions standard the Fourth Circuit required. See *infra* at 10; U.S. Opp. 3 n.1.

[3] Industry petitioners including Duke Energy unsuccessfully sought rehearing in *New York I* on the basis that that "the reasoning and analysis" of the Fourth Circuit's decision "compel" that the D.C. Circuit strike down the 1980 and 2002 regulations. Utility Air Regulatory Group En Banc Pet., No. 02-1387 at 1; *New York II*, 2006 WL 662746, *6 (rejecting industry intervenors' (including Duke's) effort to "reargue" their NSPS-based argument). Duke's plea for more "percolating" (Opp. 22) must be understood as a euphemism for using enforcement proceedings to try to bamboozle *other* courts into disregarding the D.C. Circuit's role under Section 307(b) and its repeated holdings on what the Act's PSD provisions unambiguously require

not address the argument based on *Rowan* because that argument had been waived. Yet even they cannot deny that the D.C. Circuit reached its opposite and irreconcilable result construing the exact same statutory text construed by the Fourth Circuit. Under Section 307(b), the D.C. Circuit's unqualified upholding of the 1980 and 2002 regulations on PSD emissions increases is the definitive word on their validity (absent review by this Court, for which the time has now expired). The result is a very real conflict: national regulations held valid by the D.C. Circuit were held invalid in another circuit, on broad statutory grounds that apply to every vintage of PSD regulations. As the United States noted below (U.S. En Banc Pet. 11), these conflicting rulings are "precisely" what Section 307(b) was "enacted to prevent."

3. Respondents have *no answer* to the direct conflict (see Pet. 8, 22, 25-26) between *New York I*'s square holding that the statute requires use of an "actual emissions" standard for PSD, and the Fourth Circuit's ruling that the same statutory text forbids that test, or indeed any standard not identical to the NSPS "potential" hourly emissions test. The Fourth Circuit's holding that EPA must use the NSPS maximum hourly rate measure for the PSD program – based on that court's view that "'Congress has directly spoken to the precise question at issue," App. 10a & App. 11a n.3 (quoting *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984)) – is directly inconsistent with the D.C. Circuit's holding in *New York*, *also* based on "*Chevron* Step 1," "that the CAA unambiguously defines 'increases' in terms of actual emissions." 413 F.3d at 39. See also *id.* at 40 ("the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions"). Accord *Alabama Power*, 636 F.2d at 400.[4] The NSPS "maximum hourly rate"

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[4] Contrary to Duke's claim (Br. 19) the D.C. Circuit's ruling in *Alabama Power* that the term "source," which occurs in both the NSPS and PSD modification definitions, must be interpreted differently for PSD than

standard is a test of *potential* emissions, whereas the "actual, annual" PSD test invalidated here is a test of actual emissions, and the choice between them has enormous implications, in many cases determining whether the PSD program will even apply. See *New York I*, 413 F.3d at 14-15; 45 Fed. Reg. at 52680 (contrasting annual "'actual emissions'" and hourly "potential to emit" standards); U.S. Opp. Br. 3 & n.1, 7 n.3.

Indeed, the two courts' divergent answers to how Congress meant EPA to measure PSD emissions increases – both *"Chevron I"* rulings based on the Act's "unambiguous" language – led the United States, in seeking rehearing en banc in this case, to observe that the Fourth Circuit had held that the Act "mandates" that EPA use the same test of emissions increases in PSD regulations as it uses for NSPS, while the D.C. Circuit held that the Act "mandates a contrary interpretation." U.S. En Banc Pet., No. 04-1763 at 10-11; *id.* at 11 (quoting *New York I*'s holding that "'the CAA unambiguously defines emissions increases in terms of actual emissions"). EPA's 2005 notice likewise acknowledges, albeit less directly, the clash between the two courts' rulings.[5]

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NSPS did not turn on different language in the statutory definitions. In fact, the court held, in conflict with the Fourth Circuit here, that, although the statutory definition of "stationary source" applicable under PSD is the same as the NSPS statutory definition found in 42 U.S.C. 7411(a)(3), EPA could employ different regulatory definitions due to "differences in the purpose and structure of the two programs." 636 F.2d at 401-02. Although Duke trumpets (Br. 22) that the Petitioners have "not found a single case that allows an agency to interpret 'identical statutory definitions'" differently, it needs look no further that *Alabama Power*, which did so with respect to the very statutory definitions at issue. See also *New York*, 413 F.3d at 19, 39-40; U.S. Opp. 8.

[5] Compare 70 Fed. Reg. at 61100 (*New York I* "held that the language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions, instead of potential or allowable emissions.") and *id.* at 61098 (Fourth Circuit ruled CAA "mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification' * * * * [and that] for purposes of the PSD program, emissions increases must be determined by comparing the pre- and post-change maximum hourly emissions.").

Rather than trying to refute our demonstration (Pet. 8, 22, 25-26), or recanting its own portrayal of *New York* and the decision below as establishing diametrically opposed statutorily-required "mandates" on how to measure emissions increases, the United States now deems it the better part of valor to *omit all mention* of that conflict. But its silence should not obscure the enormous significance of the conflicting judicial mandates on how EPA is to measure emissions increases: the choice between them determines whether PSD applies to projects that increase actual emissions by thousands of tons per year (the actual annual test), or exempts them (the maximum hourly rate test). See *New York I*, 413 F.3d at 15 (discussing *Puerto Rican Cement*, 889 F.2d at 293, 296-99); Pet. 9-10, 26-27; Pet App. 88a-89a (stipulation that Duke's Plant Modernization Program would not cause emissions increase under maximum hourly rate test); U.S. Opp 3 & n.1. Because the conflicting D.C. Circuit and Fourth Circuit tests are based upon the respective courts' understanding of the Act's unambiguous commands, EPA lacks discretion, whatever its "belief," to depart from either based on policy concerns. See *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, 2700 (2005) (agencies' discretion to re-interpret statute limited when prior court decision "holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

4. EPA's "belief" in its ability to handle "any difficulties" by rulemaking, U.S. Opp. at 9, further emphasizes why this Court's review is warranted. In both this case and in *New York I*, EPA pleaded for discretion to define emissions "increases"; but both courts rejected that plea and endorsed directly opposite tests based on unambiguous statutory language. That even EPA cannot square the circle perhaps explains the United States' choice to ignore the conflicting judicial mandates on actual versus potential emissions, but it also defeats any argument for administrative cure.

Logic prevents EPA's proposal from *complying* with both

the Fourth Circuit's and D.C. Circuit's readings of the Act, but EPA's proposal manages to *violate* both. First, EPA's proposal would manifestly fail the Fourth Circuit's textually mandated rule that the NSR and NSPS tests for emissions increases must – because of the shared statutory definitions – be "identical" and "the same." See 70 Fed. Reg. at 61081 (noting that "there are differences in the two programs that prevent a wholesale adoption of the NSPS modification definition into the major NSR provisions" – the very rationale that the Fourth Circuit rejected here, App. 16a-17a). Second, and more significantly given the D.C. Circuit's place under Section 307, EPA's proposal to transplant a slightly altered version of NSPS "maximum hourly rate" standard into PSD is directly inconsistent with the D.C. Circuit's repeated insistence that the Act demands a test based on "actual emissions instead of potential or allowable emissions." *New York I*, 413 F.3d at 40. If EPA wanted to challenge the D.C. Circuit's construction of the Act, it needed to petition for certiorari in *New York I* (which it did not).

Because the Fourth and D.C. Circuits' decisions are both "*Chevron 1*" rulings, EPA has no discretion to depart from either based on policy considerations, such as EPA's newfound distaste for the PSD program (70 Fed. Reg. at 61093-95) as administered "to date," *id.* at 61089, *i.e.*, for more than a generation. The United States' unsuccessful petition for rehearing en banc in *New York I* recognized just this point, urging that the D.C. Circuit "Panel's holding that the statute allows only tests based on actual emissions thus restricts EPA's ability to further reform the NSR program." See U.S. En Banc Pet., No 02-1387 at 2. However eager for "reform" an agency may be, unambiguous congressional intent (as determined by federal courts exercising lawful jurisdiction) remains a constraint. See *New York II*, 2006 WL 662746, *4 (invalidating as contrary to CAA's text, and as based on "Humpty Dumpty" approach to statutory construction, EPA proposal that would have substantially narrowed scope of PSD/NSR program).



EPA's inchoate proposal to establish a maximum hourly rate test "consistent with the Fourth Circuit's holding in *Duke Energy*," 70 Fed. Reg. at 61083, must also be viewed in light of the agency's strenuous arguments below and elsewhere that such a test would eviscerate the effectiveness of the PSD program by exempting projects that increase pollutants by hundreds of tons per year. *E.g.*, EPA Opening Br. in No. 04-1763 at 45; Reh. Pet. at 14. Courts bound to vindicate the enacted will of Congress, see *New York I*, 314 F.3d at 39-40, should not lightly step aside when an agency rushes to embrace what it acknowledges as an incorrect, ultra vires judicial decision that weakens a statutory program.

There are further reasons why the prudential case for "leaving it to the agency" must be at its absolute nadir here. Even where EPA has not been confronted with directly conflicting appellate holdings, proposed rulemakings often languish,[6] and its history of rulemaking in this specific area is particularly unpromising: Long-considered, then dropped, EPA proposals delayed review of the 1980 rules for more than two decades, see *New York I*, 413 F.3d at 14-15, and the last NSR emissions test change took many years. See 61 Fed. Reg. 38,249 (July 23, 1996); 67 Fed. Reg. 80,186 (Dec. 31, 2002). EPA's 2005 Notice is notably undefined, since it contains no actual regulatory language, and would be limited in scope: (1) it would cover Electric Generating Units only, leaving unaffected the larger class of industrial and other non-EGU sources subject to PSD, and (2) would not affect enforcement proceedings (see Pet. 29 n.15) underway or to be

[6] Compare, *e.g.*, 62 Fed. Reg. 66182 (Dec. 17, 1997) (proposing pretreatment standards for control of certain wastewater pollutants), with 62 Fed. Reg. 66182 (Aug. 18, 1999) (withdrawing proposed rule); 55 Fed. Reg. 30798 (July 27, 1990) (proposing regulations on RCRA corrective action), with 64 FR 54604, 54604 (Oct. 7, 1999) (withdrawing "most provisions" of the 1990 proposal); 52 Fed. Reg. 31162 (Aug. 19, 1987) (EPA's proposing on-board refueling vapor recovery systems); with 57 Fed. Reg. 13220 (April 15, 1992) (final decision not to impose ORVR), *vacated by NRDC v. EPA*, 983 F.2d 259 (D.C. Cir. 1993).

filed under the 1980, 1992 and 2002 rules – *all* of which use an actual emissions PSD test that violates the Fourth Circuit's construction of the statute, see U.S. Opp. 3 n.1, 7 n.3.[7]

5. Indeed, it is outright false to say (U.S. Opp. 7) that the Fourth Circuit's ruling is "of no continuing importance" because it affects only the 1980 regulations. The court's construction of the Act also invalidates the emissions increase test the 1992 PSD regulations, which applied to some of Duke's activities. See U.S. Opp. 3 n.1. And the latest PSD regulations, enacted in 2002, share the precise feature (an actual, annual test for emissions increases that is *not* identical to NSPS) that the Fourth Circuit held contrary to the Act's plain language. Compare *New York I*, 413 F.3d at 19-20 (upholding 1980 *and 2002* regulations against argument that EPA violated the Act by using the actual test for PSD, rather than the potential test used under NSPS). See U.S Opp. at 3 n.1, 4. Because it impugns the 2002 regulations governing current operations and planning, the ruling below is causing widespread confusion concerning the present and future obligations of sources within and outside the Fourth Circuit, and stands as a continuing invitation for collateral attacks on those national, D.C. Circuit-validated rules.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[7] The states and citizens downwind from the old coal-burning plants involved in these cases, involving millions of tons of pollutants and massive federal and state enforcement resources, have strong interests in ensuring these actions are not undermined by a reading of the CAA the United States recognizes is entirely wrong. See State Amicus Br. 3.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF OF *AMICI CURIAE* NATIONAL PARKS CONSERVATION ASSOCIATION AND OUR CHILDREN'S EARTH FOUNDATION IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST[1]

The National Parks Conservation Association ("NPCA") is a nonprofit citizen organization whose purpose is to protect and enhance the natural and cultural resources of America's National Park System as well as forests, wilderness, and open space areas through research, public education, advocacy, and litigation. NPCA was founded in 1919 and today has over 450,000 members nationwide. NPCA, with its members, is active in protecting air quality in natural areas of interest.

As part of its activities, NPCA is a plaintiff in two Clean Air Act citizen suits against the Tennessee Valley Authority alleging the same type of violations at issue in this case. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (pending) and *National Parks Conservation v. TVA*, No. 06-10729-J (11th Cir.) (pending). NPCA contends that these alleged violations (from TVA plants located in Alabama and Tennessee) cause hundreds of tons of needless pollution annually and are having a significant adverse impact on protected federal lands, including Great Smoky Mountains National Park.

Our Children's Earth Foundation ("OCE"), a non-profit membership organization, is dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improving environmental quality for the public benefit. OCE has members in Tennessee, and to protect the interests of its members, particularly from the impact of TVA's alleged excessive emissions of sulfur dioxide

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than amici curiae or their counsel made any monetary contributions to its preparation or submission. Both Petitioner and Respondent consented to this filing; their letters of consent are being submitted with the brief.

(a precursor to fine particle pollution),[2] OCE has joined NPCA as a plaintiff in the Clean Air Act citizen suit in Tennessee. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (currently pending).

## SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this case did precisely what the Clean Air Act's enforcement scheme was designed to prevent: permit a facial challenge to a regulation in the context of an enforcement action. 42 U.S.C. § 7607(b)(2). This brief in support of the petition focuses on the plain language of the applicable regulations themselves and shows the Fourth Circuit's decision does not comport with that language. Accordingly, this analysis shows that the Fourth Circuit failed to analyze the regulatory text at all, but based its holding instead on a theory that the regulations are inconsistent with the statute. This invalidation of the regulations was proper only in the D.C. Circuit, and that circuit has upheld the regulations. Allowing this type of collateral attack on a validly promulgated regulation would undermine the enforcement scheme created by Congress for the Clean Air Act and many other environmental statutes. Furthermore, given the serious air pollution problems in national parks caused by power plants, and the number of those plants that have allegedly violated the regulations at issue here, this case is of compelling national interest.

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[2] *See* (Proposed) Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4572 (Jan. 30, 2004)("Mass associated with ammonium sulfate concentrations make up a significant portion (25 to 50 percent) of the annual average $PM_{2.5}$ mass. The largest sulfate contributions to $PM_{2.5}$ mass occur during the summer season mainly within a large multi-State area centered near Tennessee and Southwest Virginia.").

# ARGUMENT

## A. THE UNDERLYING ISSUE IN THE CASE.

Under the Clean Air Act's Prevention of Significant Deterioration program ("PSD"), 42 U.S.C. §§ 7470-79, if an owner of a major stationary source makes a "major modification," then it becomes subject to emission limits known as "Best Available Control Technology" ("BACT"). 40 C.F.R §§ 51.166 § (i) and (j). In this case, the plaintiffs alleged that Duke Energy had undertaken 29 projects at eight coal-fired power plants between 1988 and 2000, and each of these projects met the definition of "major modification." Pet. App. 25a-26a. Because these projects were "major modifications," Duke Energy should have obtained stringent BACT emission limits for them, but it never did. The plaintiffs seek an order requiring Duke Energy to obtain the emission limits and operate under them, potentially leading to reductions in hundreds of thousands of tons in sulfur dioxide and nitrogen oxide emissions.

In order to have a "major modification" for the purposes of the PSD program, there must be: (1) a physical change in or change in the method of operation at a major stationary source that would (2) result in a significant net emissions increase. 40 C.F.R. § 51.166(b)(2). The Fourth Circuit's opinion focused on this second element. The plaintiffs contended that in order to have a modification, there must be an increase in ***annual*** actual emissions. Pet. App. 6a-7a. The defendant utility contended that there must be an increase in the ***hourly*** rate of emissions. Pet. App. 6a-7a. Which test applies has practical real world consequences.

The measure of a power plant's ability to generate power in a particular hour is known as its "capacity." Pet. App. 67a.

A power plant, as it ages, may be able to maintain its maximum capacity when it is operating, but it may not be available to generate power around the clock, particularly because malfunctions, or "forced outages," cause unplanned shutdowns. *United States v. Ohio Edison Company*, 276 F. Supp. 2d 829, 838 (S.D. Ohio 2003). Accordingly, a power company can undertake massive overhauls that eliminate forced outages, significantly improving a plant's availability, on an ***annual*** basis, yet leave its "capacity" to generate power in any particular ***hour*** when it is operating, unchanged. In this case, Duke Energy argued that its projects did not trigger the PSD regulations because the projects did not increase the facilities' hourly capacity. Pet. App. 7a. Thus, if the applicable regulations are interpreted to require an increase in ***annual*** actual emissions, the projects, assuming they are found to be non-routine, triggered the PSD regulations, but if the regulations are interpreted to require an increase in the ***hourly*** rate of emissions, they did not.

## B. THE FOURTH CIRCUIT'S INTERPRETATION CANNOT BE SUPPORTED BY THE LANGUAGE OF THE REGULATIONS.

In this case, the Fourth Circuit, under the guise of "interpreting" the applicable regulations, held that in order to have a "major modification," a project must lead to an increase in the hourly rate of emissions, not just an increase in annual actual emissions. Pet. App. 6a-7a. The language of the applicable regulations cannot support the Fourth Circuit's interpretation, however. Accordingly, the only way the Fourth Circuit could have achieved its holding was by invalidating the regulation, something it had no jurisdiction to do. 42 U.S.C. 7607(b)(2). This brief, offered in support of the Petition, closely examines the applicable regulations to show that they cannot support the Fourth Circuit's result.

In 1980, EPA issued regulations providing guidance to States on how to structure PSD programs in their State Implementation Plans ("SIPs"). 45 Fed. Reg. 52676 (Aug. 7, 1980). (EPA recodified these regulations into 40 C.F.R. § 51.166 in 1987). The states of North Carolina and South Carolina incorporated these federal regulations into their SIPs in 1982. *See* 47 Fed. Reg. 7836, 7837 (Feb. 23, 1982) (North Carolina) and 47 Fed. Reg. 6017 (Feb. 10, 1982) (South Carolina). Thus it is the language of 40 C.F.R. § 51.166 that must be the focus in this case.

The regulations define "major modification," subject to key exceptions discussed below, as:

> [A]ny physical change in or change in the method of operation of a major stationary source that would result in a significant ***net emissions increase*** of any pollutant subject to regulation under the Act.

40 C.F.R § 51.166(b)(2)(I) (emphasis added). Pet. App. 103a.

"Net emissions increase" is defined as follows:

> [T]he amount by which the sum of the following exceeds zero: (a) [a]ny increase in ***actual emissions*** from a ***particular physical change or change in the method of operation*** at a stationary source; and (b) [a]ny other increases and decreases in ***actual emissions*** at the source that are contemporaneous with the ***particular change*** and are otherwise creditable.

40 C.F.R § 51.166(b)(3)(i)(emphasis added). Pet. App. 104a.

The key analysis under this definition is whether the particular "change" will lead to an increase in "actual

emissions." This term "actual emissions" has a lengthy definition:

> (i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii)- (b)(21)(iv) of this section.
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> (ii) In general, actual emissions as of a particular date shall equal the average rate, ***in tons per year***, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is ***representative of normal source operation***. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.
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> (iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.
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> (iv) ***For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.***

40 C.F.R § 51.166(b)(21) (emphasis added).

Given this language, to determine whether an increase in "actual emissions" will occur, one generally looks to the facility's annual emissions for the two years preceding the project, 40 C.F.R § 51.166(b)(21)(ii), and compares them to the facility's emissions after the project. This analysis, of course,

must occur before a project is undertaken, and so EPA, in promulgating the regulation, had to develop some methodology for estimating what actual emissions would be after the project. EPA exercised its discretion and chose to define "actual emissions" for a facility that had not begun "normal operations" to be the facility's "potential to emit"[3] after the project. 40 C.F.R § 51.166(b)(21)(iv). The D.C. Circuit upheld EPA's decision to interpret the emissions increase test in this way in *New York v. Environmental Protection Agency*, 413 F.3d 3, 18 (D.C. Cir. 2005).

This test is commonly known as the "actual to potential" test, Pet. App. 57a, and it sweeps many sources into the PSD program because of its inherent assumption that sources, after making a modification, will operate "24 hours per day, 365 days per year." *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 916 (7th Cir. 1990). The Seventh Circuit, however, rejected the application of this test, holding that if a power plant is engaged in a "like-kind replacement," then EPA cannot properly say that the source making the modification has not commenced normal operations. *Id.* (interpreting 40 C.F.R § 51.166(b)(21)(iv)).

After the Seventh Circuit's 1990 ruling, EPA created a special emissions increase test exclusively for power plants that allows a plant owner to determine whether emission increases

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[3] The regulations define "potential to emit" as: "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source." 40 C.F.R § 51.166(b)(4).